

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

IN THE MATTER OF:)	Docket No. CWA-08-2004-0004
)	
Nichelson Oil, Inc.)	
4402 15 th Avenue, NW)	ADMINISTRATIVE COMPLAINT AND
Fargo, Cass County, ND)	OPPORTUNITY TO REQUEST HEARING
)	
Respondent.)	Proceeding to Assess Class I Civil Penalty Under Section 311 of the Clean Water Act

AUTHORITY

1. This is a civil administrative action issued under the authority vested in the Administrator of the Environmental Protection Agency ("EPA") by section 311(b)(6)(B)(i) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1321(b)(6)(B)(i), as amended by the Oil Pollution Act of 1990. The Administrator has properly delegated this authority to the undersigned EPA officials. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules") set forth at 40 CFR part 22, a copy of which is enclosed.

GENERAL ALLEGATIONS

2. Respondent is a corporation organized under the laws of North Dakota, and a "person" within the meaning of sections 311(a)(7) and 502(5) of the Act, 33 U.S.C. §§ 1321(a)(7) and 1362(5).

3. The Respondent owns and operates a bulk fuel storage facility located at 4402 15th Avenue, NW, Fargo, North Dakota ("facility"). The facility includes, but is not limited to,

four storage tanks with a combined capacity of approximately 57,000 gallons of diesel and one 12,000 gallon tank of gasoline, for a total oil storage capacity of approximately 69,000 gallons.

4. Diesel and gasoline are oils within the meaning of “oil” as defined at § 311(a)(1) of the Act, 33 U.S.C. § 1321(a)(1).

5. Respondent stores, transfers, distributes, uses or consumes oil or oil products at the facility.

6. Respondent is now, and was at the time of the inspection, an “owner and operator” of an “onshore facility” within the meaning of sections 311(a)(6) and (10) of the Act, 33 U.S.C. §§1321(a)(6) and (10).

7. The facility is a “non-transportation related” onshore facility within the meaning of 40 CFR § 112.2.

8. The facility is located adjacent to a natural drainage ditch which flows to the county drainage ditch which drains into the Red River.

9. The natural drainage ditch, the county drainage ditch, and the Red River, are “navigable waters” and “waters of the United States” within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7) and 40 CFR § 110.1.

10. Section 311(j)(1)(C) of the Act, 33 U.S.C. § 1321(j)(1)(C), provides that the President shall issue regulations "establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil ... from vessels and from onshore and offshore facilities, and to contain such discharges"

11. EPA promulgated the oil pollution prevention regulations, set forth at 40 CFR part 112. 40 CFR § 112.1(b) states that the requirements of part 112 apply:

to owners or operators of non-transportation related onshore and offshore facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil or oil products, and which, due to their location, could reasonably be expected to discharge oil in harmful quantities, as defined in part 110 of this chapter, into or upon the navigable waters of the United States or adjoining shorelines”

12. The facility is a non-transportation onshore facility which, due to its location, could reasonably be expected to discharge oil to a navigable water of the United States (as defined by section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 CFR § 110.1) or its adjoining shoreline that may either (1) violate applicable water quality standards or (2) cause a film or sheen or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

13. The facility is subject to the oil pollution prevention requirements of 40 CFR part 112, pursuant to section 311(j) of the Act, 33 U.S.C. § 1321(j), and its implementing regulations.

14. 40 CFR § 112.3 requires that owners or operators of onshore and offshore facilities prepare a Spill Prevention, Control, and Countermeasure (“SPCC”) plan in writing, and in accordance with applicable sections of part 112, including, but not limited to, sections 112.7 and 112.8.

15. Section 311(b)(6)(A) of the Act, 33 U.S.C. § 1321(b)(6)(A), states in pertinent part that any owner, operator, or person in charge of any vessel, onshore facility or offshore facility (ii) who fails or refuses to comply with any regulation issued under subsection (j) of this section to which that owner, operator, or person in charge is subject, may be assessed a class I or class II civil penalty by ... the Administrator.

16. On or about September 13, 2002, EPA conducted an unannounced SPCC inspection ("the Inspection") of the facility.

17. At the time of the Inspection, the facility had a total fuel storage capacity of approximately 69,000 gallons, including, three 15,000 gallon diesel fuel storage tanks, a 12,000 gallon diesel fuel storage tank, and a 12,000 gallon gasoline fuel storage tank.

18. The facility did not have a written SPCC plan at the time of the Inspection.

19. The facility subsequently provided a SPCC plan to the inspector which was reviewed and found to be inadequate as follows:

- a. Failure to have the certification of a Professional Engineer;
- b. Failure to include periodic SPCC plan reviews;
- c. Failure to adequately address discharge and equipment failure predictions;
- d. Failure to address written procedures for inspections, obtain the requisite signatures, and maintain records;
- e. Failure to adequately address spill prevention training for personnel;
- f. Failure to designate a person responsible for discharge prevention;
- g. Failure to schedule discharge prevention briefings for oil handling personnel;
- h. Failure to adequately address security measures;
- i. Failure to address procedures for sealing loading and unloading connections;
- j. Failure to address the truck loading and unloading area;
- k. Failure to provide secondary containment for truck loading and unloading area;
- l. Failure to address a warning or barrier system to prevent premature vehicular departure during loading/unloading;
- m. Failure to address inspections of lower drains of vehicles prior to departure during loading and unloading;
- n. Failure to address drainage from undiked areas;

- o. Failure to adequately address written procedures and record keeping requirements for drainage of rainwater from diked areas; and
- p. Failure to adequately address integrity testing of containers.

20. The following SPCC implementation measures were found to be deficient at the facility at the time of the Inspection:

- a. Failure to conduct inspections in accordance with written procedures and to maintain the written inspection records for three years;
- b. Failure to instruct personnel in spill prevention procedures;
- c. Failure to conduct spill prevention briefings with operating personnel;
- d. Failure to provide fencing or other security measures for the facility;
- e. Failure to provide a warning or barrier system to prevent premature vehicular departure;
- f. Failure to provide secondary containment for truck loading and unloading area;
- g. Failure to maintain records of discharges and to provide supervision for facility drainage from diked areas; and
- h. Failure to provide facility drainage from undiked areas to a pond, basin, or equivalent catchment device.

21. Respondent failed to prepare and implement a SPCC plan in writing and in accordance with the regulations at 40 CFR §§ 112.7 and 112.8 as required by 40 CFR §112.3.

22. Respondent's failure to prepare and implement a SPCC plan in writing and in accordance with the regulations at 40 CFR §§ 112.7 and 112.8 from September 13, 2002, through and including November 17, 2003, (a duration of approximately 433 days) constitutes violations of 40 CFR §112.3 and sections 311(b)(6)(A), 33 U.S.C. § 1321(b)(6)(A), and 311(j)(1)(C), 33 U.S.C. § 1321(j)(1)(C) of the Act.

CIVIL PENALTY

23. Based on the foregoing Allegations and pursuant to the authority of section 311(b)(6)(B)(i) of the Act, 33 U.S.C. § 1321(b)(6)(B)(i), and 40 CFR § 19.4, Complainant proposes the assessment of administrative penalties against the Respondent in the amount of \$18,847. Complainant proposes this penalty amount after considering the applicable statutory penalty factors in section 311(b)(8) of the Act, 33 U.S.C. § 1321(b)(8): the seriousness of the violation, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.

24. The Respondent's noncompliance is deemed to be moderate as the violations significantly affect the ability of the Respondent to prevent discharges of oil from impacting waters of the United States. Eight SPCC implementation measures were deficient on the date of the inspection. Sixteen requirements were absent from the SPCC plan submitted subsequent to the Inspection. The potential environmental impact from a discharge would be moderate as there is a natural drainage ditch located adjacent to the facility which drains to the county drainage ditch located within approximately fifty feet of the facility. Respondent is presumed to have a thorough knowledge of the oil spill prevention regulations at 40 CFR part 112 given the specific well-documented compliance assistance EPA and the North Dakota Petroleum Marketers Association provided to Respondent from approximately 1993-1995, regarding the regulations specific to the development of an SPCC plan and the implementation of SPCC measures. The

Respondent did not qualify for any penalty reduction based on mitigation factors. No additions were made to the proposed penalty amount based on either a history of violations or economic benefit.

TERMS OF PAYMENT FOR QUICK RESOLUTION

25. If Respondent does not contest the findings and penalty proposal set out above, this action may be resolved by paying the proposed penalty in full pursuant to 40 CFR § 22.18. If such payment is made within 30 calendar days of receipt of this Complaint, no answer need be filed. For more time for payment, Respondent may file a statement agreeing to pay the penalty within 30 days of receipt of the Complaint, then pay the money within 60 days of such receipt. Payment is to be made by sending a cashier's or certified check payable to "Oil Spill Liability Trust Fund," with the docket number and name of the facility written on the check, to:

Jane Nakad
Technical Enforcement Program (8ENF-UFO)
U.S. EPA Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466

Payment of the penalty in this manner does not relieve Respondent of its obligation to comply with the requirements of the statute and regulations. Payment of the penalty in this manner shall constitute consent by Respondent to the assessment of the proposed penalty and a waiver of Respondent's right to a hearing on this matter.

OPPORTUNITY TO REQUEST A HEARING

26. As provided in the Act, a Respondent has the right to a public hearing to contest this Complaint. If you (1) contest the factual claims made in this Complaint; (2) contest the appropriateness of the proposed penalty; and/or (3) assert that you are entitled to judgment as a

matter of law, you must file a written answer in accordance with section 22.15 and 22.38 of the Consolidated Rules within 30 calendar days after receipt of this Complaint. Your answer must (1) clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with regard to which you have knowledge; (2) state circumstances or arguments which are alleged to constitute grounds for defense; (3) state the facts you dispute; (4) the basis for opposing the proposed relief, and (5) specifically request an administrative hearing, if desired. Failure to admit, deny, or explain any material factual allegation in this Complaint will constitute an admission of the allegation. The answer and one copy must be sent to:

Tina Artemis, Regional Hearing Clerk (8RC)
U.S. EPA Region 8
999 18th Street, Suite 300
Denver, Colorado 80202-2466

and a copy must be sent to the following attorney:

Brenda L. Morris, Enforcement Attorney (8ENF-L)
U.S. EPA Region 8, Legal Enforcement Program
999 18th Street, Suite 300
Denver, CO 80202-2466
Telephone: (303) 312-6891

IF YOU FAIL TO REQUEST A HEARING, YOU WILL WAIVE YOUR RIGHT TO FORMALLY CONTEST ANY OF THE ALLEGATIONS SET FORTH IN THE COMPLAINT.

IF YOU FAIL TO FILE A WRITTEN ANSWER OR PAY THE PROPOSED PENALTY WITHIN THE 30 CALENDAR DAY TIME LIMIT, A DEFAULT JUDGMENT MAY BE ENTERED PURSUANT TO 40 CFR § 22.17. THIS JUDGMENT MAY IMPOSE THE PENALTY PROPOSED IN THE COMPLAINT.

SETTLEMENT CONFERENCE

27. The EPA encourages settlement of a proceeding at any time if the settlement is

consistent with the provisions and objectives of the Act and applicable regulations and is willing to explore this possibility in an informal settlement conference. If you or your attorney, if you choose to be represented by one, have any questions or wish to have an informal settlement conference with EPA, please call Brenda Morris at 303-312-6891. Please note that a request for, scheduling of, or participation in a settlement conference does not extend the period for filing an Answer and request for hearing as set out above. The settlement process, however, may be pursued simultaneously with the administrative litigation procedures found in the Consolidated Rules. If a settlement can be reached, its terms must be expressed in a written consent agreement, signed by the parties and incorporated into a final order signed by the Regional Judicial Officer.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8**
Office of Enforcement, Compliance and
Environmental Justice, **Complainant.**

Date: 11/14/03 By: **SIGNED**
Elisabeth Evans, Director
Technical Enforcement Program

Date: 11-17-03 By: **SIGNED**
David J. Janik, Supervisory Enforcement Attorney
Legal Enforcement Program

Date: 11-17-03 **SIGNED**
Brenda L. Morris, Enforcement Attorney
U.S. EPA, Region 8
999 18th Street, Suite 300 (8ENF-L)
Denver, CO 80202-2466

Telephone: 303/312-6891
Facsimile: 303/312-6953

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING was hand-carried to the Regional Hearing Clerk, EPA Region 8, 999 18th Street, Suite 300, Denver, Colorado, and that a true copy of the same was sent via certified mail to:

Vance Nicholson, Registered Agent for
Nicholson Oil, Inc.
1902 7th Avenue North
Fargo, ND 58102-3206

11/17/03
Date

SIGNED
Judith McTernan

IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE REGIONAL HEARING CLERK.

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON NOVEMBER 17, 2003.